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IN THE
SUPREME COURT OF THE UNITED STATES

THE COUNTY OF NASSAU, a Municipal Corporation; JOSEPH JABLONSKY,

Petitioners,

-against.-

RAY E. SHAIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

INTEREST OF THE AMICUS CURIAE 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION SO THAT IT MAY RESOLVE THE ISSUE OF WHETHER A STRIP SEARCH POLICY OF POST ARRAIGNMENT MISDEMEANOR ARRESTEES THAT EFFECTIVELY DISCOVERS AND DETERS THE INTRODUCTION OF CONTRABAND INTO PRISONS, THEREBY ENSURING THE SAFETY AND SECURITY OF THE INSTITUTION STAFF AND OTHER PRISONERS, .IS CONSTITUTIONALLY REASONABLE. 11

CONCLUSION.....18

TABLE OF AUTHORITIES

Cases **Page**

Bell v. Wolfish,
441 U.S. 520 (1979). 3, 13

Block v. Rutherford,
468 U.S. 576 (1984). 5, 13

Dobrowolskj v. Jefferson Co.,
823 F.2d 955 (6th Cir. 1987) 15

Fuller v. M.G. Jewelry,
950 F.2d 1437 (9th Cir. 1990) 15

Hause v. Vaught,
993 F.2d 1079 (4th Cir. 1993),
cert. den., 510 U.S. 1049 (1994) 15

Shain v. Ellison,
273 F.3d 56 (2d. Cir. 2001) ..... passim

Turner v. Safley,
482 U.S. 78 (1987) 3, 9, 12, 16, 17

Walsh v. Franco,
849 F.2d 66 (2d Cir. 1988) 11, 14

Washington v. Harper,
494 U.S. 210 (1990) 9, 12, 17

Weber v. Dell,
804 F.2d 796 (2d Cir. 1986) 11, 14

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PRELIMINARY STATEMENT

The City of New York ("the City") submits this brief in support of the petition for a writ of certiorari in this matter.

INTEREST OF THE AMICUS CURIAE

(1)

Confronting the United States Court of Appeals for the Second Circuit in Shain v. Ellison, 273 F.3d 56 (2d. Cir. 2001), was the constitutionality of Nassau County (New York) Correctional Center's policy (NCCC) of subjecting all misdemeanor and minor offense post-arraignment arrestees remanded to the NCCC to a visual body cavity strip search absent reasonable suspicion that the remanded individuals were concealing contraband. The Court of Appeals for the Second Circuit held that the United States Constitution, Amend. IV, precludes prison officials from performing a strip/body visual cavity search of an arrestee charged with misdemeanors or other minor offenses unless they have a reasonable suspicion that the arrestee is concealing weapons, drugs or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest. The Second Circuit rejected the argument that although the strip search

policy impinges on an inmate's constitutional right, the propriety of the regulation should be upheld because it is "reasonably related" to such legitimate penological interests as the safety of the institution staff and other prisoners. See, Turner v. Safley, 482 U.S. 78, 89-90 (1987).

To reach its determination, the Second Circuit held that the "reasonably related" standard is controlling where the relevant correctional institution is a "[a] state or federal facility of confinement for convicted criminals, especially felons, as opposed to a jail, a correction facility that houses persons convicted of minor crimes and pre-trial detainees. In the City's view, this distinction ignores this Court's trenchant observation that that "[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates" Bell v. Wolfish, 441 U.S. 520, 547 n 20 (1979). These detainees may have serious prior records. Id.

The City has a significant interest in this Court granting the petition for certiorari in this matter because the

Shain decision effectively usurps the legitimate authority of prison experts in New York City, as it did to those authorities in Nassau County, to implement the security precautions they consider necessary for the effective and safe operations of its institutions. The Circuit Court's decision turns on an artificial distinction, jail versus prison, that bears little relation to reality of running a penal system in a city the size of New York. The myriad safety and security issues of a penal system the size of New York City's is and would continue to be seriously compromised by a decision that takes little account of its inherent dangers.

(2)

The Department of Corrections for the City of New York maintains ten facilities on Rikers Island, three of which are responsible for the initial processing of inmates. Administration of facility this size is a task of "monumental proportions." Cf,. Block v. Rutherford, 468 U.S. 576, 583

(1984). Many of the misdemeanor new admissions are misdemeanor and felony recidivists.

In 1998, there were 183,851 non-felony arrests in the City of New York. In 1999, there were 191,999 non-felony arrests. As a result, in calendar year 1999, the average number of daily new admissions was 332. On April 28, 2000, there were 12,981 detainees in Rikers Island. The number is comprised of inmates with pending criminal charges, newly sentenced inmates who are awaiting transfer to the NYS Department of Correctional Service, parole violators and State contract inmates. Of this population, 2847 were in custody on non-felony matters. Of that group, 2241 had been in custody previously for a felony matter.

Each inmate's housing assignment was based on a classification assignment that includes age and a risk assessment including criminal history and security risk group affiliation such as gang members and the severity of the current charge. In addition, there was special, subset housing units within each of the main categories for gay,

mental observation, protective custody, enhanced restraints, administrative and punitive segregation.

There is no separate housing based on the class of criminal charge for which the inmate has been arrested. This fact allows commingling and interactions between inmates of all criminal backgrounds.

Over the past five years, the Department of Corrections has developed an aggressive search operation. In fiscal year 1996, the Department stepped up its search operations and conducted 105,100 searches that recovered 8006 weapons while in fiscal year 1997, 158,875 searches recovered 9329 weapons. In fiscal year 1998, 182,760 searches were conducted resulting in a recovery of 6812 weapons. In fiscal 1999, 252,404 searches recovered 5122 weapons. In other words, searching for weapons and other contraband within the institutions of Riker's Island is essential to the maintenance of security and safety of both institution staff and prisoners.

A modification of the Department's strip search policy exempting misdemeanor detainees will compromise the Department's efforts to maintain security in its facilities. Not only will the Department be prevented from conducting a visual body search, but it will not be permitted from conducting a manual search of clothing that is needed for security because detainees are permitted to wear the same clothing as a member of the public would wear. Part of a strip search procedure includes a manual inspection of seams, hems and waistbands of new admissions.

Strip searches are performed to prevent contraband from entering and remaining in the correctional facility and for the safety of the institutional personnel. The holding in Shain is premised on the questionable notion that the likelihood of a misdemeanor arrestee bringing into or maintaining contraband in a penal institution can be determined by the crime charged. This notion is further undermined by the fact that the Shain holding would

encourage those who are desirous of smuggling weapons, drugs and other contraband into a penal institution to induce persons through reward or coercion to be arrested for misdemeanors with such material secreted on their person knowing that the arrestee would not be subject to a visual cavity strip search.

As we discuss above, the jail/prison division ignores the arrestee's past criminal history, age and other background information. Shain is premised on an unsupported distinction between a jail and a prison, a concept that has no bearing on running a complex penal institutions in a metropolitan area such as New York City. It marks an inappropriate usurpation of security measures implemented by prison administration experts that requires reversal.

SUMMARY OF THE ARGUMENT

In this matter, the Court of Appeals for the Second Circuit determined that the United States Constitution, Amend. IV, required prison officials to find "reasonable

suspicion" that an arrestee charged with a misdemeanor carried a weapon or contraband before performing strip/body visual cavity search.

However, this Court has held that "when a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner, supra, 482 U.S. 78, 89-90 (1987). In Washington v. Harper, 494 U.S. 210, 223-224 (1990), this Court explained that the Turner standard of review was based upon the need to reconcile its longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. "These two principles apply in all cases in which a prisoner asserts that a prison regulation violates the Constitution." Id

This Court should grant the petition in order to resolve the conflict as to what standard should be applied to determine the propriety of body cavity searches of post-arraignment detainees. Not only is there an apparent

conflict as to what standard is to be applied between the Second Circuit and this Court, but there is a conflict as to what standard is to be applied among other Circuit Courts.

The issue at bar derives additional importance from the fact that the Second Circuit's approach represents a substantial intrusion into the administration of such large penal institutions as those found in New York City and Nassau County. Significantly, in reaching its determination, the Court of Appeals for the Second Circuit effectively bypassed this Court's admonition that courts should play a very limited role in the administration of detention facilities with regard to such issues as safety and security.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION SO THAT IT MAY RESOLVE THE ISSUE OF WHETHER A STRIP SEARCH POLICY OF POST ARRAIGNMENT MISDEMEANOR ARRESTEES THAT EFFECTIVELY DISCOVERS AND DETERS THE INTRODUCTION OF CONTRABAND INTO PRISONS, THEREBY ENSURING THE SAFETY AND SECURITY OF THE INSTITUTION STAFF AND OTHER PRISONERS, .IS CONSTITUTIONALLY REASONABLE.

(1)

The issue presented by the petition in this matter is what is the proper test to be applied in determining whether the United States Constitution, Amend. IV, precludes prison officials from performing a strip/body visual cavity search of an arrestee charged with misdemeanor.

The Court of Appeals for the Second Circuit, when confronted with this issue, claimed that it was bound to follow its holding in Walsh v. Franco, 849 F.2d 66 (2d Cir. 1988) and Weber v. Dell, 804 F.2d 796 (2d Cir. 1986). Shain, supra, 273 F.3d at 56. Those cases stand for the proposition that prison officials may not conduct strip

searches with visual cavity inspections of arrestees charged with misdemeanor or minor offenses absent a "reasonable suspicion" that the arrestee is concealing contraband. This suspicion may be based on the crime charged, the particular characteristics of the arrestee or the circumstances of the arrest. Walsh, supra, 849 F.2d at 68-69.

However, a year after Weber, this Court held that "when a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89-90 (1987). Enlarging on this principle in Washington v. Harper, 494 U.S. 210, 223-224 (1990), this Court stated that the Turner standard of review was based upon the need to reconcile its longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult judgments concerning institutional operations. "These two principles apply in all cases in

which a prisoner asserts that a prison regulation violates the Constitution." Id.

This Court should resolve the issue of whether the Turner reasonably related standard should be applied to the question of the legal propriety of the cavity search of a post-arraignment detainee. The holding in Shain marks a profound intrusion into the administration of such large penal institutions as those found in New York City and Nassau County. Significantly, in reaching its determination, the Court of Appeals for the Second Circuit essentially ignored this Court's admonition that courts should play a very limited role in the administration of detention facilities. Block, supra, citing, Bell v. Wolfish, 441 U.S. 520, 539 (1979). The Circuit Court's decision compels prison administrators to focus on one set of variables, those related to reasonable suspicion. The multi-factor approach of Turner permits administrators to consider the necessity of cavity searches in the context of how to maintain safety and security in the context of the particular facility.

(2)

Walsh and Weber, unlike the case at bar, involved aresstees confined in pre-arraignment detention. Those searches were conducted prior to a judicial determination that probable cause justified Walsh and Weber's extended incarceration. Those plaintiffs not only retained the privilege and expectation of parole but both plaintiffs were, in fact, released at the police processing stage of the action. Walsh, supra, 849 F.2d at 67; Weber, supra, 804 F.2d at 799. In contrast, the search challenged in the case at bar, was conducted after plaintiff was remanded to the custody of the Nassau County Department of Correction by the District Court after arraignment.

In addition, the challenged search was conducted only when plaintiff was admitted into the general jail population. On this point, it is important to note that a significant factor repeatedly considered by other Circuit Courts in determining the constitutionality of strip searches was whether the search was conducted on a detainee who

was simply awaiting bail or a pre-trial detainee who was admitted or who was about to be admitted into the general jail population. See e.g., Hause v. Vaught, 993 F.2d 1079, 1082 (4th Cir. 1993), cert. den., 510 U.S. 1049 (1994); Fuller v. M.G. Jewelry, 950 F.2d 1437, 1448 (9th Cir. 1990); Dobrowolskj v. Jefferson Co., 823 F.2d 955, 958 (6th Cir. 1987).

The Second Circuit "sidesteps" these difficulties by holding that the "reasonably related" standard is controlling where the relevant correction facility is a prison and the "reasonable suspicion" standard is controlling where the relevant correctional facility is a jail. Shain, supra, 273 F.2d at 71 (Cabranes, dissenting). As to this distinction, the majority in Shain points to no cases that differentiate between jails and prisons in the manner they suggest. Indeed, Judge Robert Katzman in his concurrence, while feeling constrained by precedent to join in the majority, acknowledged that that "this Circuit's choice to distinguish either between misdemeanors and and felonies or between

jails and prisons is not necessarily persuasive to me." .Shain, supra, 273 F.2d at 70.

Significantly, Judge Cabranes noted in his dissent in Shain that "our sister Circuits routinely apply *Turner's* 'reasonably related' standard to cases involving jails" and cites several cases to support his assertion. Id. On this basis, Judge Cabranes concludes that the majority's decision creates a Circuit split "that calls out for resolution by the Supreme Court." Id. at 70.

(3)

This Court explained in Turner that

> Running a prison is an inordinately difficult undertaking that requires expertise, planning and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of power concerns counsel a policy of judicial restraint. where a state penal system is involved, federal courts have . . . additional reasons to accord deference to the appropriate authorities. 482 U.S. at 84-85.

Amplifying on this principle, this Court in Washington, supra, 494 U.S. at 223-224, explained that that "reasonably related" standard was adopted "based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration (citation omitted). . . We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." This Court clearly sought to give deference to prison administrators so as to allow them to "adopt innovative solutions to the intractable problems of prison administration. . . ". Turner, supra, 482 U.S. at 79. In addition, as explained by this Court, a stricter standard would "inevitably" make courts "the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetrat[ing] the involvement of the federal courts in affairs of prison administration. (citation omitted).'". Id.

In sum, the holding of Shain marks a serious conflict with the holdings of this Court and other Circuit Courts in an area of significant penal institution administration. To reach its holding, the Second Circuit has resorted to unrealistic differentiating of jails and prisons in an attempt to evade to import of the principles of Block and Turner. This radical result endangers both corrections officials and prisoners. This Court should accept this case to resolve this significant and pressing problem.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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